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IN THE

Supreme Court of the United States

October Term, 1957

No. 371

UNITED TOWING COMPANY, ET AL., *Petitioners*
v.
H. A. PHILLIPS, TRUSTEE, *Respondent*

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONERS' REPLY TO BRIEF FOR RESPONDENT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioners, United Towing Company, Greens Bayou Marine Service Company, John D. Jones and Holt P. Daniels, herein, respectfully present this brief in reply to brief for Respondent on Petition for Writ of Certiorari.

Correct Statement of One of the Questions Presented

Respondent has attempted a statement of one of the questions presented but a more correct statement would be "Whether a transfer of all of the capital stock of one Texas corporation (Greens Bayou), by a second Texas corporation (Dick) to a third Texas corporation (United) in satisfaction of a valid debt (created by a cash loan from United to Dick, to keep Dick operating) was a fraudulent conveyance within the meaning of Section 67d of the Bankruptcy Act and Article 3996, V.A.C.S. of Texas, where the transfer was made more than four months prior to the filing of an Involuntary Petition in Bankruptcy against Dick and where the same three persons constituted all of the officers and directors, and substantially all of the stockholders of both the transferor and the transferee corporations", or stated in another way, "Where "U" and "D" corporations have same officers and directors, and substantially same stockholders, and "U" loans "D" cash money for payment to creditors and other operational purposes, can "D" legally pay back its debt to "U" more than four months prior to Bankruptcy in preference to other creditors".

Other questions presented in Petition (pg. 2, 3).

Statutes Involved

Respondent's statement of Statutes Involved is substantially correct.

Statement

A preference payment of a debt more than four months prior to the filing of an Involuntary Petition in Bankruptcy is permitted under the Bankruptcy Act even though Bankrupt be insolvent at the time. *Nicholson v. Scott*, 50 F. Supp. 209, 211, Syl. 8.

Respondent in his reply brief to Petition for Certiorari gives the hereinafter set out reasons why the Court should deny the Writ of Certiorari.

Respondent's Reason 1

That the transfer of the stock was fraudulent and void under the *Corsicana National Bank v. Johnson*, 251 U.S. 68, 64 L. Ed. 141, 40 S. Ct. 82, and *Geddes v. Anaconda Mining Company*, 254 U.S. 590; L. Ed. 425, 41 S. Ct. 209, because the officers and directors and majority stockholders of Dick and United were the same.

Respondent's Reason 2

That the transfer of the stock by Dick to United in satisfaction of the debt due by Dick to United was prima facie fraudulent under Section 67(d) of the *Bankruptcy Act* and Article 3996, *V.A.C.S. of the State of Texas*, in that it was made without fair consideration and with actual intent to hinder, delay and defraud creditors.

Respondent's Reason 3

That a valid pledge of the Greens Bayou stock by Dick to United under Article 1358-1, *V.A.C.S. of Texas* (Petition 10) was not shown because for a corporation to pledge its stock as security for a loan, there must be (1) a valid debt owing by the corporation; (2) authority to endorse and deliver the stock certificate as security for the loan duly vested in an officer or an agent by the directors; and (3) delivery of the certificate properly endorsed.

Respondent's Reason 4

There was no exceptional showing of error and no grounds under Rule 19 of this Court.

Respondent's Reason 1 Restated

That the transfer of the stock was fraudulent and void under the *Corsicana National Bank v. Johnson*, 251 U.S. 68, 64 L. Ed. 141, 40 S. Ct. 82, and *Geddes v. Anaconda Mining Company*, 254 U.S. 590, L. Ed. 425, 41 S. Ct. 209, because the officers and directors and majority stockholders of Dick and United were the same.

Petitioners' Argument Against Respondent's Reason 1

Neither the *Corsicana National Bank* case nor the *Geddes* case support this contention. The *Corsicana National Bank* case says: "Transactions through officers or directors acting at the same time for both companies are presumptively fraudulent, and therefore *voidable by stockholders* within a reasonable time after discovery, *unless expressly authorized or ratified by the stockholders.* The stockholders of Dick being the officers thereof, as well as the officers and the majority stockholders of United, accepted the loan to Dick by United and approved of the transfer of the Greens Bayou stock to United by Dick in settlement of the debt. Since they performed the acts of transferring the stock they certainly authorized and ratified it. *Victoria Gravel Co. v. Neyland*, 114 S.W. 2d 415, E.R. The *Geddes* case simply holds that the consideration must be fair. The fairness of this consideration will be discussed under Respondent's Reason 2.

Neither of the cases of *Mercury Life and Health Company v. Hughes*, 271 S.W. 2d 842, and *Dunaghan v. Bushey*, 152 Texas 630, 263 S.W. 2d 148, cited by Respondent are in point as they were cases of individual contracts between the corporation and its directors which is not our case as both Dick and United were distinct legal organizations or corporations and possessed independent powers and privileges and so not withstanding their identity of stock ownership and affiliation in management, for some purposes, must be regarded as separate corporations, for instance, as being capable of contracting with each other. *Corsicana National Bank v. Johnson*, Syl. 11.

Respondent's Reason 2 Restated

That the transfer of the stock by Dick to United in satisfaction of the debt due by Dick to United was prima facie fraudulent under Section 67(d) of the *Bankruptcy Act* and Article 3996, *V.A.C.S. of the State of Texas*, in that it was made without fair consideration and with actual intent to hinder, delay and defraud creditors.

Petitioners' Argument Against Respondent's Reason 2

The Trial Court in its "Conclusions of Law" says (R. 305, Par. 5):

> "It is claimed that such transfer constitutes a conveyance fraudulent in law within the meaning of Section 67, Sub. (d) (2) (a) of the Bankruptcy Act."

"It is also claimed that such transfer constitutes a conveyance fraudulent in law within the meaning of Section

67, Sub. (d) (2) (b) of the Bankruptcy Act", then goes on to say (R. 307) "Under these two quoted statutes the transfer is not fraudulent, however, unless incurred without fair consideration". Article 3996, *V.A.C.S. of Texas*, contains this same provision; "This article shall not affect the title of a purchaser, *for valuable consideration*, unless it appears that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

The only offered evidence of value of the Greens Bayou stock or land that it represented was by Respondent's own witness, Mr. Peckinpaugh who placed a gross value of $87,951 on the stock and land that it represented (R. 30), and Mr. Leslie Appelt, Petitioners' appraiser, who placed a gross value on the stock and land it represented of $89,492.50 (R. 50). Respondent admitted these were gross values (R. 204) and that the property was encumbered to the extent of at least $25,000 (R. 20, 46, 204) making the stock or land have a net value of around $63,000 which stock was exchanged by Dick to United in satisfaction of a debt of $82,277.80 so found by the Trial Court (R. 300); "I find that such stock and other property was transferred to United in satisfaction of Bankrupt's debt of $82,277.80." The preference payment of Dick's debt to United *for a fair consideration more than four months prior to Bankruptcy* certainly did not show any intent to defraud creditors. "Fraud is not to be presumed and something more is required than the mere weight of preponderance of evidence, and it must be established by clear, unequivocal and convincing evidence." *Nicholson v. Scott*, 50 F. Supp. 209, Syl. 5, 7, 8; *Finefrock v. Kenova Mine Car Co.*, 37 F. 2d 310, 313. Where is any clear, unequivocal and convincing evidence of any fraud in Dick paying back

to United a perfectly valid debt? In the *Scott* case *it was conceded that at the time of the transfer in question, the defendant, Charles W. Scott was insolvent and was unable to meet his debts* but the consideration being fair, the transfer was considered not fraudulent. The *Nicholson v. Scott* case also holds fair consideration is given for property when in exchange for such property as a fair, equivalent therefor, and in good faith, property is conveyed or *an antecedent debt is satisfied.*

Respondent's Reason 3 Restated

That a valid pledge of the Greens Bayou stock by Dick to United under Article 1358-1, *V.A.C.S. of Texas* (Petition 10) was not shown because for a corporation to pledge its stock as security for a loan, there must be (1) a valid debt owing by the corporation; (2) authority to endorse and deliver the stock certificate as security for the loan duly vested in an officer or an agent by the directors; and (3) delivery of the certificate properly endorsed.

Petitioners' Argument Against Respondent's Reason 3

It is submitted that the Trial Court's finding of no pledge of the stock as security for the loan by United in the instant case is a decision in conflict with applicable state law, for the following reasons: (1) a valid debt owing by Dick to United was found by the Trial Court (R. 300, par. (m); (2) Mr. Daniels testified to the endorsement and delivery of the stock certificate as security for the loan. He was an officer and director and the delivery was with the authority of the President, Mr. Jones,

and with his knowledge and approval. Mr. Daniels testified that he and Mr. Jones, the President, discussed the pledge of the stock with Mr. Casteel, the other stockholder and officer, and director (R. 59), *"so after we consulted with Casteel and he agreed that was the thing to do, I went back in the Dick Towing Company file* (both Dick and United officed on same floor but used different bookkeepers and Banks for their business) *and got it out of there, we have the one certificate evidencing all the shares in Green's Bayou held by Dick, and brought it in to Mr. Jones".* (R. 54) *"It had already been indorsed and was transferable after the indorsement of the stock".*

Respondent's Reason 4 Restated

There was no exceptional showing of error and no grounds under Rule 19 of this Court.

Petitioners' Argument Against Respondent's Reason 4

It is submitted that when the trial court went outside of the offered evidence of value of the Green's Bayou property (R. 30, 50, 204, 20, 46) and arbitrarily found a value, that had not been offered as evidence, this *found value* was erroneous, being unsupported by any substantial or competent evidence. In using this incompetent and unsubstantial evidence of value as a basis for finding that an unfair consideration was exchanged, this finding also was erroneous.

The Court has also found that the agreement to transfer the Greens Bayou stock for the debt as stated in the Directors' minutes of January 26, 1953 (R. 295, 296, 297) was not a binding contract although it recited the

acceptance of an offer by United to accept the stock in settlement of the debt and, although not necessary, United ratified it on February 6, 1953, according to Mr. Daniel's testimony (R. 67). Under state law this would have become a binding contract on January 26, 1953, more than a year prior to bankruptcy, regardless of the fact that the actual transfer date of the stock was postponed to October, 1953. The Trial Court's finding that this was not a binding contract is in conflict with *St. Louis Southwestern Railway Co. v. Mitchell-Chrittenden Tie Co.*, 148 S.W. 1191 (error refused), which holds *the effective date of the contract was when the parties agreed to its terms and not when it was to be performed.* The record in this case is overrunning with admissions by Respondent and testimony (R. 52, 59, 60) to the effect that if Dick had not received the money from United at the time it did, it would probably have had to sell its equipment and go out of business or could not have continued to operate. Respondent admitted that Dick needed money in a hurry and got money in a hurry from United, the only source that it could borrow any money at the time. Under *Blackman v. Bechtel*, 80 F. 2d 505, 508, this honest effort on the part of United to help Dick avert a financial crash and to continue in business was a perfectly legal and commendable transaction, as it promoted the interest of all creditors. In the face of all of this, Respondent has the gall to make the contention that when Dick paid United back the loan, it was in defraud of creditors, intentionally overlooking the admitted fact that Dick would have been out of business some fourteen months sooner if United had not loaned Dick the money, and that United was the only source from which Dick could secure any money to continue operating. If that is an

honest contention on the part of the Respondent, then something has been left out of our Golden Rule Book. Respondent's "Dime Novel" words, such as "filch", "scattergun", and "cut from same cloth", are far removed from legal phraseology but their use is no surprise when considering Respondent's contention that it is quite legal for United to lend Dick money to keep it operating and to avert a financial crash but it is illegal and fraudulent for Dick to pay the money back, more than four months prior to bankruptcy.

Respondent should have gone further in his brief and correctly informed the Court that the Greens Bayou stock under the agreement of all parties concerned was left in the custody of Petitioners' attorney, pending the outcome of the suit (R. 175). That after the overruling of Petitioners' Motion for Rehearing in the Fifth Circuit Court of Appeals, both the stock and possession of the property were voluntarily turned over to Respondent. No damages have been caused to Respondent by the filing of the Petition for Certiorari since Respondent has possession of the property and the stock.

Conclusion

For the above reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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